No. 15,391

In the

United States Court of Appeals

For the Ninth Circuit

BENJAMIN B. HOFFMAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

Appeal from the United States District Court
District of Arizona

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES

OTHER AUTHORITIES

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NATURE OF CASE

The appellant (defendant in the Court below) was charged by indictment, filed on October 26, 1955, with violating the Mail Fraud Statute Title 18, Section 1341 U.S.C.A. and The Statute relating to Fraud by interstate wire, Title 18, Section 1343 U.S.C.A. (3-10).[1]

The indictment contained 11 Counts. Count VI was dismissed on motion of the United States Attorney. Counts I, II, IV, V, VI, VII, X and XI were for violation of Title 18

1. Figures in parentheses refer to pages in printed Transcript of Record.

Section 1343, *supra*. Counts III, VIII and IX were for violation of Title 18, Section 1341, *supra*.

The case came on for trial on September 18, 1956, (26) and appellant was found guilty on all Counts (except Count VI) by a jury on September 24, 1956 (18). Motions in Arrest of Judgment and for New Trial were duly made and were by the Court denied (22). Judgment was entered on October 8, 1956 (23, 24). Notice of Appeal was filed October 18, 1956 (24, 25). The defendant is now imprisoned.

BASIS OF JURISDICTION

The District Court had jurisdiction by virtue of the nature of the case, inasmuch as the offenses charged in the indictment were against the laws of the United States, and by the express provisions of Title 18, Section 3231 U.S.C.A. (62 Stat. 826).

This Honorable Court of Appeals has jurisdiction because this is an appeal from a final decision of a District Court of the United States, and such appeal is authorized by the express provisions of Title 28, Section 1291 U.S.C.A. (62 Stat. 929).

STATEMENT OF THE CASE

The Indictment

THE SCHEME.

The indictment, insofar as the scheme is concerned, charges in substance that "on or about the 29th day of May, 1953" the defendant[2] "devised a scheme to obtain money and property by means of false and fraudulent pretenses and promises". The scheme set forth is that the defendant used the names of two companies "to place orders, outside the State and District of Arizona, on open account with

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2. The appellant will be designated in this brief either as "appellant" or "defendant".

various persons, firms and companies dealing in food and food products, and in placing said orders, the defendant represented that" the two companies were active and responsible business concerns, "with good credit rating and that the goods would be paid for promptly in full". It is then charged that the "aforesaid representations and promises were made to induce the persons, firms and companies to ship their merchandise to the defendant on credit". It is further charged that defendant knew that the two named companies were, in fact, not active and not possessed of a good credit rating, but were created by defendant to accomplish his scheme. That "token payments" were made on account to induce the sellers to further rely on the false representations and promises previously made. That the defendant converted said food and food products immediately into cash "by selling same, keeping the proceeds for his own use and benefit" (3-4). The foregoing is substantially the scheme alleged by the Government. It will be noted that the scheme alleged is not from "on or about the 29th day of May, 1953" to any given date or to the date of the finding or filing of the indictment.[3] In short, the scheme is not alleged to be a continuing scheme.

THE GIST OF THE OFFENSES.

Following the scheme in Count I is the gist of the offense under Title 18, Section 1343 U.S.C.A. which we will hereafter refer to as the "Wire Count" as distinguished from the "Mail Count" (Title 18, Section 1341 U.S.C.A.).

We will quote the gist of the "Wire Count" contained in Count I which is identical in verbiage with Counts II, IV,

3. See Form 3 "Indictment for Mail Fraud" Appendix of Forms to Federal Rules of Criminal Procedure 18 U.S.C.A. page 612. While this form is illustrative, it does contain the bare *minimum allegations* in this kind of a case.

V, VII, X and XI except as to times, places and names of persons or companies from whom merchandise was ordered. The offense charged in Count I under the "Wire" Statute is that

> "On or about the 23rd day of November, 1954, in the District of Arizona, the defendant Benjamin B. Hoffman, for the purpose of executing the aforesaid scheme and artifice did, by interstate wire, telephone Long's Date Gardens in Pasadena, California, and place an order for food products, viz., dates, to be delivered to the Acme Distributing Company, Tempe, Arizona, *and in furtherance of said scheme did make the fraudulent representations and promises as aforesaid.*" (Emphasis ours.)

It will be noted that in all the "Wire" Counts, this language appears at the end of each Count:

> "* * * and in furtherance of said scheme did make the fraudulent representations and promises aforesaid."

The "mail" Counts (III, VIII and IX) are more orthodox. Count III charges the mailing by defendant of a cashier's check for $500.00 at Phoenix, Arizona, addressed to "Long's Date Gardens", Pasadena, California (5-6). Count VIII charges the defendant with the mailing at Tucson, Arizona, of a request for samples addressed "R. O. Kelley Cannery" at Midville, Georgia (8). Count IX charges the defendant with mailing, at Tucson, Arizona, a confirmation of an order for merchandise placed via long distance telephone (9), which was addressed to "Hayward's Special Products Company" in Hohen Solms, Louisiana.

These "mail" Counts will be discussed later on in connection with the evidence adduced in support thereof.

The Mail Fraud Statute and the Interstate Wire Statute are similar insofar as devising or intending to devise a

scheme to defraud is concerned.[4] In short, both statutes require a scheme to defraud to be shown prior to the mailing or the using of an interstate wire, as the case may be. Both statutes likewise also require that the mailing or telephoning, as the case may be, take place while the scheme is still in existence.

THE FACTS.

The facts given in a light more favorable to the Government show that defendant ordered merchandise by telephone from various persons and companies named in the "wire" Counts; that he received nearly all of the merchandise so ordered and did not pay for same. In some instances, however, payments were made on account. The merchandise was all sold to defendant on credit or on open account, and without (except in one instance) any investigation by the sellers of the credit standing of defendant, or the two companies named in the indictment. The Government did show in some instances, merchandise received by defendant was sold below the price it was invoiced to him. In the one instance where a credit investigation was made, a carload of peas consigned to defendant was stopped in transit and not delivered to defendant because of an adverse report on his credit rating (222, 223).

In all instances, in reference to the "wire" Counts, the Government failed to prove that the fraudulent representations and promises set forth in the scheme in Count I and realleged by reference in all the other Counts were made as alleged, or at all. We will epitomize in the Argument, *infra*, the evidence in the record on the "wire" Counts which shows that the defendant did not "make the fraudulent

4. Sections 1341 and 1343 "are cast in substantially the same language". *U.S. v. Mercer*, 133 Fed. Supp. 288, 289 (Cal.).

representations and promises aforesaid"—that is to say, the representations and promises as set forth in the alleged scheme. We will also show that the "mail" Counts are without support in the evidence for the same and other reasons.

QUESTIONS INVOLVED

1. Do the facts set forth in the first paragraph of Count I of the indictment (3-4) set forth a scheme to obtain money and property by means of false and fraudulent pretenses, representations and promises, where (a) there is no specific charge of a scheme to defraud "or intending to devise any scheme or artifice to defraud" and, (b) where the indictment is defective for failure to set out the particulars of the scheme to defraud, and (c) the alleged scheme is not a scheme to defraud? These questions were raised by Motion to Dismiss (11).

2. Does the indictment, by alleging that the defendant "on or about the 29th day of May, 1953 * * * *devised* a scheme to obtain money and property by means of false and fraudulent pretenses, representations and promises" allege a continuing scheme beyond the date set forth in the indictment as the time when the scheme was devised? This question was also raised by Motion to Dismiss (11).

3. Are the "wire" Counts sustained by evidence sufficient for the jury to say beyond a reasonable doubt that the defendant is guilty on the "wire" Counts in view of the express allegation in each of said "wire" Counts, to-wit, "and in furtherance of said scheme did make fraudulent representations and promises *as aforesaid*" where the evidence shows that such representations and promises were not made? Our contention in this behalf is that where there is no substantial evidence in the record to support a finding beyond a reasonable doubt, that the defendant made the

representations and promises as alleged in Count I and re-alleged in each and every other "wire" Count in the indictment relating to the use of an interstate wire for purpose of defrauding, a motion for judgment of acquittal should have been granted. This was raised by defendant's motion for judgment of acquittal on each and every Count of the indictment (17, 18, 373, 379).

4. Was the evidence sufficient to submit to the jury the question as to whether the defendant, beyond a reasonable doubt (a) mailed the letters, (b) that they were mailed in furtherance of the scheme as alleged?

It will be noted that the defendant is not charged with using a fictitious name or address in violation of Title 18, Section 1342 U.S.C.A.

5. The admissibility and sufficiency of the evidence to show identification of the defendant as the one who telephoned. This was raised by objections to the evidence and the motion for judgment of acquittal on the "wire" Counts.

6. The admissibility and sufficiency of the evidence with reference to all the "mail" Counts. This was raised by objections to the evidence and the motion for judgment of acquittal.

7. Did the court err when, after an objection was made by counsel for defendant to evidence on the grounds that no foundation has been laid, by making these statements:

> "The Court: If they don't prove their case, I will direct a verdict.
>
> Mr. Whitney: Thank you.
>
> The Court: So don't interrupt just the minute a question is asked." (40)?

8. Does the indictment charge a conversion of personal property that is only punishable by state laws?[5]

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5. *U.S. v. Beall* (Cal.), 126 Fed. Supp. 363, 365.

SPECIFICATIONS OF ERROR

I.

The lower Court erred in denying appellant's motion for dismissal of each and every Count in the indictment, and in denying defendant's motion in arrest of judgment for the reason that the indictment and each Count thereof does not state facts sufficient to constitute an offense against the United States, in that (a) the scheme to defraud, as alleged, is not a continuing scheme, and (b) the scheme is not charged with sufficient particularity to enable the defendant to know the charge against him by direct and positive averment and not inferentially; (c) that said scheme alleged by the Government shows nothing more than transactions on credit; that the persons, firms and companies are not named in the alleged scheme, and no excuse is given for not naming them, such as "To the Grand Jury unknown".

II.

The lower Court erred in denying defendant's motion for judgment of acquittal at the end of the Government's case, and at the end of the entire case, as to Counts I, II, IV, V, VII, X and XI of the indictment for the reason (a) that the evidence was wholly insufficient to submit to the jury these particular Counts because the Government failed to prove that the defendant made the fraudulent representations and promises over the telephone as alleged in said scheme, and in furtherance thereof, as charged in each of said Counts.

III.

The lower Court erred in denying defendant's motion for judgment of acquittal at the end of the Government's case and at the end of the entire case as to Counts III, VIII and IX because (a) the evidence was insufficient to submit to the

jury the question beyond a reasonable doubt as to whether said mailings were made, or if made, were in furtherance of a scheme to defraud where the evidence clearly shows that the Government failed to prove the scheme as alleged, or at all and therefore, such use of the mails could not be in furtherance of a scheme to defraud, and (b) because if there was a scheme, it was consummated prior to the time the letters were mailed, and (c) because the entire evidence shows that the transactions were credit transactions and the placing of orders for goods in and of itself does not constitute the promises and representations charged in each Count of the indictment, and (d) because the matter mailed did not contain any representations whatsoever.

IV.

The lower Court committed prejudicial error in stating before the jury, after an objection had been made to evidence that if the Government didn't prove its case, he would direct a verdict, because the jury would be led to believe that if he did not direct a verdict, the defendant would be assumed guilty; the following is the objection and the Court's comments:

> "Q. What did the person ask?
>
> Mr. Whitney: If the Court please, I object to it on the grounds that no foundation has been laid for it. This is a different situation than if a man has an established phone.
>
> The Court: If they don't prove their case I will direct a verdict.
>
> Mr. Whitney: Thank you.
>
> The Court: So don't interrupt just the minute a question is asked."

V.

The lower Court erred in admitting Government's Exhibit 51 in evidence for the reason that said Exhibit was a tele-

phone toll bill showing calls in August 1953 (334, 335), whereas Count X of the indictment (9) alleges the gist of the offense to have been committed on or about August 13, 1954.

ARGUMENT

The Indictment Does Not State Facts Sufficient to Constitute An Offense Against the United States.

I.

The lower Court erred in denying appellant's motion for dismissal of each and every Count in the indictment, and in denying defendant's motion in arrest of judgment for the reason that the indictment and each Count thereof does not state facts sufficient to constitute an offense against the United States, in that (a) the scheme to defraud, as alleged, is not a continuing scheme, and (b) the scheme is not charged with sufficient particularity to enable the defendant to know the charge against him by direct and positive averment and not inferentially; (c) that said scheme alleged by the Government shows nothing more than transactions on credit; that the persons, firms and companies are not named in the alleged scheme, and no excuse is given for not naming them, such as "To the Grand Jury unknown".

The scheme set forth in Count I of the indictment and realleged in each and every other Count, is not alleged to be a continuing scheme. Insofar as the time of its formation and duration is concerned, it is alleged that:

> "on or about the 29th day of May, 1953, Benjamin B. Hoffman , * * *, devised a scheme to obtain money and property by means of false and fraudulent pretenses, representations and promises; that the scheme so devised was substantially as follows: * * *".

Count XI in the indictment charges that the defendant, for the purpose of executing the aforesaid scheme and artifice, did on the 29th day of May, 1953 by interstate wire telephone "T. L. Brice Company, Sherman, Texas," and place an order for food products "and in furtherance of

said scheme did make the fraudulent representations and promises as aforesaid" (10).

The alleged scheme does not cover any period of time other than the date that the scheme was devised; that is to say, it does not cover from the first telephoning and/or mailing to the last mailing, to-wit, 13th day of December, 1954. Count III shows the last date above mentioned (5, 6).

In nearly all of the cases we have examined, the scheme is alleged to be a continuing one or alleged from a date certain to a date certain, embracing all of the dates of the various uses of the telephone and of the mails. The United States Attorney in the court below insisted that the form suggested by the Supreme Court of the United States for an indictment for mail fraud does not have to be followed. We agree. We do insist, however, that there should be some allegation that the scheme was in existence when the gist of the offense was committed. We feel that the minimum requirements in charging a scheme to defraud and the time that it was in existence is contained in the Appendix to Forms of the Federal Rules of Criminal Procedure, 18 U.S.C.A. following Rule 60, which reads, insofar as the duration of the scheme is concerned, as follows:

> "Prior to the ..... day of ....., 19....., and continuing to the ..... day of ....., 19.....,[1] the defendants, John Doe, * * * devised and intended to devise a scheme and artifice to defraud * * *".

On the footnote to this form appearing on page 613 of 18 U.S.C.A. Federal Rules of Civil Procedure, it is stated:

> "[1] Insert last mailing date alleged."

Inasmuch as the interstate wire statute is cast in about the same language as the mail fraud statute, we assume that insofar as the charge in the indictment is concerned,

the same rules would apply to the "wire" Counts as would apply to the "mail" Counts. As before stated, in nearly all the cases the allegations with reference to the duration of the scheme is in the words suggested by the Supreme Court, or an allegation of the first date with the statement following "and continuing until the filing of this indictment." If we are correct on this particular point, then all Counts, with the exception of Count XI, should have been dismissed pursuant to defendant's motion.

The cases are unanimous in holding that if the scheme is consummated before the mailing of the letter, there is no crime. The same, of course, should apply to the use of an interstate wire. See *Kann v. United States,* 323 U.S. 88, 65 S. Ct. 148, 157 A.L.R. 406. *Dyhre v. Hudspeth* (10 Cir.), 106 F.2d 286 (cited with approval by the Supreme Court of the United States in the footnotes to the *Kann* case, *supra*).

The scheme set forth in Count I is vague and indefinite (72 C.J.S., page 358, "Post Office"), and is not charged with sufficient particularity in that all the essential elements of the scheme are not alleged. If the scheme is not charged with sufficient particularity to enable the accused to know the charge against him by direct and positive averment and not inferentially, then the indictment is defective in substance and not even aided or cured by verdict. (72 C.J.S. *supra,* page 356, under heading "Description of Scheme".) *Benham v. United States,* 7 Fed. (2) 271.

The gist of the offense is the telephoning or mailing of the letters but telephoning and mailing of the letters without a scheme is not an offense; nor is the scheme in itself an offense unless the mailing or telephoning, as the case may be, is made for the purpose of executing the scheme. It cannot be before the devising of the scheme or after the scheme was consummated. The allegation in each of the Counts with

reference to the telephoning and mailing states that the defendant, Hoffman, "for the purpose of executing the aforesaid scheme and artifice * * *" did either telephone or use the mail. All of these dates are subsequent to May 29, 1953, with the exception noted. In the *Kann* case, *supra,* it is pointed out in effect that the United States mail could not have been used for the purpose of executing or in attempting to execute the fraudulent scheme, because the mailing did not take place until after the defendant had induced the parties named to accept his fraudulent check for merchandise. See Note 157 A.L.R. at page 248 under heading "When Fraudulent Scheme is Complete", citing several cases, including one from this Circuit.

The indictment is fatally defective because it does not state facts sufficient to constitute an offense against the United States as it does not set forth all the essential elements of the offense sought to be charged.

U. S. v. Hess, 124 U.S. 483, 8 S. Ct. 571, 573;
U. S. v. Mercer, et al., (D.C. Cal.) 133 Fed. Supp. 288 (Decided July 5, 1955);
Fasulo v. U. S., 272 U.S. 620, 47 S. Ct. 200;
U. S. v. Debrow, 346 U.S. 374, 74 S. Ct. 113;
Drown v. U. S., (9 Cir.) 198 F.2d 999, 1005;
Elder v. U. S., (9 Cir.) 142 F.2d 199, 200;
72 C.J.S., page 358, "Post Office".

The scheme should be charged with sufficient particularity to enable the accused to know the charge against him and must be by direct and positive averment and not inferentially. An indictment which fails to meet this requirement is defective in substance and not aided or cured by verdict (72 C.J.S. *supra,* page 356, under heading "Description of Scheme").

It will be noted that nowhere in this indictment is it stated, except by the barest inference, that the defendant devised a scheme to obtain money and property by means of fraud and fraudulent pretenses, representations and promises from the "various persons, firms, companies dealing in food and food products". In short, there is no allegation that this alleged scheme was to defraud anyone. There is not even an allegation that there was an attempt to defraud anyone.

The mail fraud statute (Title 18, Section 1341) as amended May 24, 1949, provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, and promises, * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, * * * shall be fined * * *."

In this indictment (which we will now break down) the draftsman attempted to set forth a scheme to obtain money and property by means of false and fraudulent pretenses, representations and promises. He then says "that the scheme so devised was *substantially* as follows":

(1) The defendant used the names of two companies, the Hoffman Wholesale Grocery and the Acme Distributing Company, to place orders, outside the State and District of America, on open account with various persons, firms and companies, dealing in food and food products;

(2) and in placing the said orders, the defendant represented that the Hoffman Wholesale Grocery *or* the Acme Distributing Company was an active and responsible business concern, within the State of Arizona, with good credit rating;

(3) and that the goods ordered would be paid for promptly in full;

(4) that the aforesaid representations and promises were made to induce the persons, firms, and companies receiving them to ship their merchandise to the defendant on credit;

(5) that the defendant well knew at the time the aforesaid representations and promises were made that the Hoffman Wholesale Grocery and the Acme Distributing Company were, in fact, not active and responsible business concerns in the State of Arizona, and not possessed of a good credit rating, but in truth and in fact, said companies were dummy business organizations with only nominal assets and created by the defendant to accomplish his scheme;

(6) and that the defendant further knew that the goods ordered and shipped to the Hoffman Wholesale Grocery *and* the Acme Distributing Company would not be paid for promptly in full;

(7) and the defendant did not intend to pay for said food and food products received, except to make token payments to induce the sellers thereof to further rely on the false representations and promises previously made;

(8) that as a further part of said scheme, the defendant converted said food and food products immediately into cash by selling the same, keeping the proceeds for his own use and benefit.

By examining this indictment the Court will readily see that it is so vague and indefinite that it cannot be said that a scheme to obtain money and property by means of false and fraudulent pretenses, representations and promises is set out. In *Postal Decisions*, 1939 edition, at page 237 under the heading "Devising a Scheme", it is said:

> "The devising of some scheme or artifice to defraud, or to obtain money or property by fraudulent representa-

> tions, etc., is the first ingredient of the offense, which becomes punishable when the mails are used in its execution or attempted execution. The words 'intending to devise' are the legal scales by which the scheme is to be weighed, and require that the intent and scheme to defraud shall exist at the time the mails are used. To devise a scheme or artifice to defraud is to form a plan, device, or trick to perpetrate a fraud upon another, and devising of it continues as long as the scheme is in process of execution. It is not necessary that accused be the inventor or originator of the scheme or artifice, which may be as old as falsehood, or that when the artifice was devised the schemers should have worked out all the details of its execution." (See *United States v. Corlin, et al.,* (D.C. Cal.) 44 Fed. Supp. 940 at 943.)

By the promulgation and approval by the United States Supreme Court of Form 3, Appendix of Forms, Federal Rules of Criminal Procedure, *supra,* it is made clear that it is indispensable that the indictment either (a) must allege ultimate facts which show that the scheme was, as a matter of fact, a scheme to obtoin money or property, or (b) directly allege the conclusion "to obtain money and property". No count of the indictment does either.

In *Etheredge v. United States* (C.A. 5), 186 Fed. 434, 437, the Court in discussing the necessity of setting out clearly what the scheme and artifice was and wherein the fraud consisted, how it was to be accomplished, etc., said:

> "It has been settled by repeated decisions that a good indictment under this statute must allege not only that the defendant had devised a 'scheme or artifice to defraud,' but it must also set out clearly what the artifice was wherein the fraud consisted, and how it was to be accomplished, and that charging the offense in the language of the statute alone is not sufficient. United States v. Hess, 124 U.S. 486, 8 Sup. Ct. 571, 31 L. Ed. 516; Stokes v. United States, 157 U.S. 187, 15 Sup. Ct.

> 617, 39 L. Ed. 667. Nothing in a criminal case can be charged by implication, but every fact must be clearly alleged. Carll's Case, 105 U.S. 611, 26 L. Ed. 1135; United States v. Post, 113 Fed. 852. The indictment must show clearly that the person charged has devised or intended to devise a 'scheme or artifice to defraud' * * *".

According to the indictment and the allegation, that as a further part of the scheme, defendant converted the food and food products immediately into cash by selling the same and keeping the proceeds for his own use and benefit. This would indicate that the scheme then ceased and the telephone calls and the mail used were not in furtherance of the scheme to defraud. See *U. S. v. Dale* (D.C. Cal.), 230 Fed. 750, 751.

The names of the "various persons, firms and companies, dealing in food and food products" are not given, to say nothing of the failure to allege that it was intended to defraud them. If the various persons, firms and companies were all of a class then it would not be necessary to specify the names, but here it is charged that "the aforesaid representations and promises were made to induce the persons, firms and companies, receiving them to ship their merchandise to the defendant on credit". These persons, firms and companies should be described by name or a good and true reason given for the omission of the names such as an allegation that they are "to the Grand Jury unknown". This, of course, under the pleading would not be true. The Grand Jury under the allegations must have known the names of the persons, firms and companies receiving the telephone calls and the mail. The Court will note that this is not a stock selling scheme for the purpose to defraud purchasers of stock or the general public.

In 72 C.J.S., pages 358 and 359, under the heading "Designation of Persons" it is said that the indictment should

describe by name the individuals intended to be defrauded, or a charge of scheme to defraud the public generally *or a class of persons incapable of being resolved into individuals.*

Corpus Juris Secundum says:

> "If the indictment does not charge a scheme to defraud the public generally, or a class not capable of being resolved into individuals, but clearly imports an intention to defraud definite individuals, it must describe them by name, or give a good and true reason for the omission, as that such names are to the grand jury unknown. An indictment is not defective as failing to give the names of the individuals intended to be defrauded or to allege that they were not known where it alleges that the scheme was to defraud, not an individual or group of individuals, but the general public or a class of persons not resolvable into individuals. * * *"

See also *U.S. v. Weber,* 71 F. Supp. 88, 91; 41 *Am. Jur. Post Office,* paragraph 140 at page 793.

This last citation says:

> "An omission, however, in an indictment for unlawfully mailing letters intended to defraud, to state the names of the parties intended to be defrauded * * * is satisfied by the allegation, if true, that such names and addresses are unknown to the grand jury."

As to the necessity of describing by name the individuals to be defrauded, see *Larkin v. U.S.,* 107 Fed. 697, 699. The Court used this language:

> "The indictment in this case, it is to be observed, does not charge a scheme to defraud the public generally, or to defraud a class not capable of being resolved into individuals. So charged, it would be evident that the persons intended to be injured were not known, and there could, of course, be no necessity for an averment to that effect. The scheme alleged in this indictment was 'to defraud divers other persons * * * by

> inducing those persons severally to send to him divers valuable articles, * * * and to defraud thereof the several persons who should so send the same, * * * a scheme and artifice which he * * * intended to effect by opening correspondence and communication * * * with the several persons so intended to be defrauded, and by inciting those persons to open communication with him.' These expressions clearly import an intention to defraud definite individuals, with whom it was intended to open correspondence, and who, therefore, by the settled rule of pleading, should have been described by name in the indictment, or a good and true reason given for the omission."

The last mentioned case cites *U.S. v. Hess, supra,* and *Durland v. U.S., supra.*

The three mail fraud counts (III, VIII and IX) are fatally defective. Each count alleges that defendant for the purpose of executing the scheme or artifice

> "* * * placed or caused to be placed in an authorized depository for mail matter at Phoenix, Arizona, to be sent and to be delivered by the Postal Establishment of the United States, a certain writing enclosed in a post paid envelope addressed to Longs Date Gardens, 2600 Foothill Boulevard, Pasadena 8, California, to-wit cashiers check * * *". (Note: The above is from Count III, the other Counts VIII and IX being identical except as to place and the matter caused to be delivered, etc.)

These mailing counts are the gist of the offense. Nowhere in the indictment is it alleged that the defendant "wilfully and unlawfully" did what he is charged with doing. Nowhere is it alleged that he "knowingly" did anything. The statute (Section 1341, Title 18, U.S.C.A.) uses the words "knowingly caused to be delivered by mail according to the direc-

tions thereon". The Ninth Circuit in the *Wilkes* case (80 Fed. 2d 285 at 288) discusses this identical question. Judge Mathews held that where a count charges that the defendant "knowingly, wilfully and unlawfully" did the prohibited act there is no need to use the word "knowingly" twice in the same count. See also:

Brady v. U.S. (8 Cir.), 24 Fed. 2d 399 at 401;
Postal Decisions (1939), page 279 Section 60.

Seven "wire" Counts (I, II, IV, V, VII, X and XI) charge that defendant "did by interstate wire, telephone" a place (Counts I and III) or a "Company" (Counts II, IV, V, X and XI). You just do not telephone a "place" or a "Company". This is much too vague and indefinite. You telephone some "person" not a "Company". The "wire" Counts like the "mail" Counts must be precise. "Company" is a word of indefinite meaning (8 Words & Phrases, page 254 under "Company"). A company may be a corporation, partnership, joint adventure or may be some individual person carrying on a business under a company name (Websters International Dictionary 2nd Edition).

Section 1343 and Section 1341 are analogous. The mail fraud statute, (1341) should be used to construe the wire statute, (1343) especially insofar as alleging the gist of the offense is concerned, and this goes for the "scheme". Telephoning a "Company" or a "place" does not meet the requirements of what is to be alleged in clear terms in an indictment. (Construing the "wire" statute, see: *U.S. v. Mercer,* 133 F. Supp. 288, 289, 290.)

We respectfully submit that the Indictment and each Count thereof should have been dismissed.

The Verdict on the "Wire" Counts Is Unsupported by the Evidence.

II.

The lower Court erred in denying defendant's motion for judgment of acquittal at the end of the Government's case, and at the end of the entire case, as to Counts I, II, IV, V, VII, X and XI of the indictment for the reason that the evidence was wholly insufficient to submit to the jury these particular Counts because the Government failed to prove that the defendant made the fraudulent representations and promises over the telephone as alleged in said scheme, and in furtherance thereof, as charged in each of said Counts.

Defendant moved for judgment of acquittal at the close of the Government's case (17, 373) and at the close of all the evidence (18, 379). The motions were denied.

It is defendant's contention that there was no evidence sufficient to submit the case to the jury.

We realize that if the scheme is sufficiently set out in Count I, and the proof is suffiicent on any Count that this Honorable Court will affirm because the sentence (5 years on each Count) runs concurrently.

We will now take up the "wire" Counts, and will attempt to show that none of these Counts were supported by evidence sufficient to be submitted to the jury.

It will be recalled that the indictment charges that as part of the scheme devised was that the defendant "in placing the said orders, * * * represented that the Hoffman Wholesale Grocery or the Acme Distributing Company was an active and responsible business concern, within the State of Arizona, with good credit rating, and that the goods ordered would be paid for promptly in full; that the aforesaid representations and promises were made to induce the persons, firms and companies receiving them to ship their merchandise to the defendant on credit; * * *". These are the pretenses, representations and promises the Government relies on to show the scheme.

The gist of the offense in all the "wire" Counts is that the defendant for the purpose of executing the scheme and artifice, did by interstate wire, telephone the various corporations and persons named in the "wire" Counts and each Count *winds up with the language* "and in furtherance of said scheme did make the fraudulent representations and promises as aforesaid". Assuming that the scheme is properly set forth, certainly this latter language at the end of that part of the Count that is the gist of the offense, would require that the Government prove beyond a reasonable doubt that the defendant made the fraudulent representations and promises set forth in the scheme. This the Government failed to prove.

The testimony relating to the gist of the offense, as far as Count I is concerned (if identification of defendant as the person telephoning is assumed valid), shows that a Mrs. Darling was the person the defendant telephoned, and on direct examination Mrs. Darling testified that the individual calling her asked if she had any dates to sell, to which "I told him I did, and then they told me the amount they would want, and we agreed on a price just by telephone only" (40, 41).

Q. What were the terms for the payment?

A. Well, it was just my understanding that 10 days or net 30, the way all of our other bills are paid.

Q. Did you discuss that over the telephone?

A. Not that I recall, but just from the talk on the telephone and everything, I just took it for granted that—

Q. Did he seem to know—well, state whether or not he appeared to you to know about this type of business?

A. Well, it sounded to me like he did.

Q. Is it the usual course, or, is it your usual course to grant credit to persons that call over the telephone in that manner?

A. We have, yes, but not on such a large scale, I didn't before.

Q. What was the factor that in this case caused you to grant credit of this amount?

A. Well, it was just his conversation, I would say (41).

A complete reading of Mrs. Darling's testimony will show that the defendant did no more than purchase the goods on credit and fail to fully pay for same. He did not make any of the pretenses, representations and promises charged in Count I. There is no evidence in the record to support Count I.

In Count II the gist of the offense is the telephoning to C. A. Glass Company of Los Angeles and placing an order for food products with the same allegation that in furtherance of said scheme the defendant did make the fraudulent representations and promises set forth in the scheme alleged in Count I (5).

Mr. John L. Glass, the President of the C. A. Glass Company mentioned in Count II, testified that he received a telephone call from the Acme Distributing Company on October 11, 1955 (363) * * *.

Q. Now, regarding this phone call, would you state what you remember that Mr. Hoffman said to you?

A. Well, the phone call came in to the secretary, and they referred a collect call to me, my office, because he says, my secretary said to me, "There is a collect call from Phoenix. Do you want to take it?"

I said, "I'll take it." And the conversation went something like this, in fact, it did go like this:

"This is the Acme Distributing Company, Ben Hoffman speaking. Johnnie, you must remember me. I met you about a year ago down in the market."

I said, "Oh, yes." I said that because we have a lot of—

Q. That is all right.

A. Customers. You don't want me to say any more?

Q. No. A. All right.

Q. Now go ahead with what he said.

A. Then he said, "Some of my boys this time of year have been getting some calls for California dates, now that it is October and the holiday season, and we think we could probably move quite a few down here for you. I have seen some in some of the stores here, and they look pretty good. Could you give me a quotation of prices?"

And I quoted him a certain price on a certain pack, 24 one-pound case, also a date-nut confection in a 2½-pound pack.

So then he said, "Well, you better send down a sample of it." I have forgotten at this time exactly how many, but I believe it is in our ledger what was shipped. And he said, "So we can see how the merchandise is." I said, "Okay, I'll do that."

He said, "Okay, Johnnie, I'll see you later."

Q. And that was the termination of the first telephone conversation? A. Yes.

Q. And were the goods shipped?

A. Yes, they were shipped that day (365, 366) * * *.

Q. Now, in regard to your conversation with Mr. Hoffman, were the specific terms of payment discussed?

A. No, they weren't discussed.

Q. Was there any reason why you did not discuss the terms of payment with him?

A. Yes, because generally when we talk to a customer, we don't discuss terms. We have an industry terms.

Q. Did you believe this man to be a customer, or a member of the industry?

A. I believed him to be a customer and a member of the industry.

Q. And what did he say that led you to this belief?

A. Well, in Los Angeles, there was over years past, in my experience of 15, 18 years, there has been three or four Acme Distributing Companies, from some place. I probably sold 5,000 different customers, but I know in my memory when someone says to me, This is Acme Distributing Company, it comes out of my memory that there was a customer by that name. So there wasn't any doubt in my mind when somebody was calling and placing an order, there was just no reason to doubt that he wasn't in business, or that he was—I don't know what the word would be (368) * * *.

Q. Mr. Glass, you have related the conversation, for the most part, in all of the important portions of that conversation, is that right, to the best of your knowledge?

A. Yes.

Q. And you stated that you had heard Acme Distributing Company before in your business in California, and you assumed it might be the same one, and for that reason you went ahead and shipped the merchandise, is that right?

A. That is right.

Q. And you were relying upon your past recollection of having heard the name Acme Distributing Company, and an order being placed, and that was what prompted you to go ahead and make the shipment, is that right, sir?

A. That is right.

Q. Wouldn't it be a fact that it was not, that there was not anything specifically promised you over the telephone which induced you to make the shipment, that is, by way of "I promise to pay you promptly," or anything like that? You haven't testified to any such conversation, and isn't it true that wasn't said? A. It was not said.

Q. As a matter of fact, you didn't even discuss the terms, isn't that correct?

A. No, because we never discuss the terms. (371)

This Count likewise is unsupported by the evidence.

Count IV relates to a telephone call to Grant-Whitman Company in Spokane, Washington, (6). Mr. Ehlinger testified on the phone call of June 14, 1954, as follows:

A. I first learned of the name through a collect phone call, and while I had my records, as I recall, the first call was on June 14th of 1954 (262) * * *.

Q. Now, regarding the first telephone call on June 14th, would you relate to the jury how the person represented himself? First, who he was and who he represented?

A. The person represented himself—

Mr. Whitney: Wait a minute, I object on the grounds that the caller has not been identified. They have not put in any evidence from what phone this was from, except that he said so and so.

The Court: The caller said he was Hoffman. Isn't that true, Mr. Witness?

The Witness: Yes, sir.

The Court: All right, go ahead.

Q. (By Mr. Eubank): Now, explain just how he identified himself.

A. He identified himself as Mr. Hoffman of the Acme Distributing Company.

Q. Where? A. At Tempe, Arizona.

Q. Now, in regard to that, what did he inquire about?

A. He was inquiring for prices of salmon, and as a broker, we, of course, would check with our source of supply, and I told Mr. Hoffman—

Mr. Whitney: Wait a minute, not what you did, but what Mr. Hoffman did.

The Court: He is telling what he told Mr. Hoffman. Go ahead.

The Witness: I told Mr. Hoffman we would check with our supply source and that I would transmit quantities and prices by letter and wire, which I did. And for Mr. Hoffman to call me at a subsequent date. Mr. Hoffman called and said, "This is Mr. Hoffman—"

Q. (By Mr. Eubank): Wait a minute. That was the content of the first call?

A. That was the content of the first transaction.

Q. The first conversation?

A. Yes, first conversation.

Q. All right, now, was any other product discussed on that first conversation?

A. To my knowledge, there was not.

Q. He was interested mainly in sea products?

A. Mainly in seafood products, yes.

Q. After you received the phone call, what did you do then?

A. After I received the phone call, I wrote a letter to Mr. Gavin in Seattle requesting prices on the merchandise (265, 266).

Q. All right. Now, going to the first, or the second call of Mr. Hoffman, well, the first call, did he state anything about his business character?

A. Yes, he did. He represented himself as being in the wholesale grocery business.

Q. And did he make any other representations as to business in the first call, that you recall?

A. He referred to several firms as having done business with them, who we knew.

Q. And do you recall either of these firms he referred to?

A. I recall one in particular, because they are close friends of mine, and that is Soule-Gibbs, in San Francisco.

Q. And did you inquire as to his credit rating, or any item like that? A. We did not.

Mr. Whitney: At what time was this, now?

The Witness: Pardon me?

Mr. Whitney: What time are we talking about?

Mr. Eubank: This is the first call.

The Witness: This is approximately June 14th. (276, 277).

This Count is not supported by the evidence.

Count V charges a telephone call to Shurtz Produce Company, Hutchinson, Kansas (6, 7). The evidence on this Count with reference to the "fraudulent representations and promises" alleged in the scheme follows:

Q. I see. All right. Now, when you were talking to Mr. Hoffman personally, that is the conversation we are interested in. What did Mr. Hoffman say to you?

A. Well, he had given an order for some chickens.

Q. How many?

A. And she, you know, wanted to know whether we should ship him. I said we don't know him, and he said—and I heard this on the phone—that this fellow in Albuquerque told him about us, and that is how he called to buy the chickens.

Q. Do you remember the name?

A. The Broadway Poultry Company, in Albuquerque.

Q. And had you done business with them before?

A. Yes, sir.

Q. And had you had satisfactory relations with them?

A. Yes, sir.

Q. On the basis of that phone call, what was the amount of poultry ordered?

A. It was four barrels. He wanted it right away, and we weren't in a position to ship right away, so we shipped him one barrel the next day, and followed up a couple of days later with the other three barrels by Express (327, 328) * * *.

Q. In the discussion with Mr. Hoffman, did you discuss payment terms?

A. Yes, sir, he agreed to pay on arrival.

Q. Have you ever received any payment for these?

A. We received no word at all, or payment (328, 329).

This evidence, like the other evidence, only shows a sale on credit and failure to pay.

Count VII charges a telephone call to R. O. Kelley Cannery at Midville, Georgia, for the purpose of placing a food order with the same allegations as to the representations and promises. In support of this Count, the Government offered the following evidence given by Mr. R. O. Kelley:

Q. Now, in relation to that Collect telephone call from Mr. Hoffman, would you relate the conversation you had with Mr. Hoffman?

A. As I recall, Mr. Hoffman wanted me to go ahead and ship him a truckload.

Q. And what happened?

A. And at that time our trucks were busy, and I asked to ship a small carload, that it would be very little difference in the number of cases, and he gave me permission to go ahead and ship this minimum carload.

Q. In that conversation, did you discuss at all his credit situation? A. No, I didn't.

Q. Did you discuss any other terms than the terms that you had already discussed in the mail?

A. To my knowledge I didn't, other than just the standard terms, and I don't think they were mentioned.

Q. Is there any other statement you recall that Mr. Hoffman made at that particular occasion?

A. No, I do not recall (221).

Incidentally, Mr. Kelley first contacted Hoffman Wholesale Grocery by letter (215) which was received in evidence

over objection as Government's Exhibit 29 (216). The letter was addressed to Hoffman Wholesale Grocery, Tucson, Arizona, and states, in effect, that Mr. Holmes at Sandersville, Georgia, had given us (R. O. Kelley Cannery) your name with advice that Holmes was not in a position to furnish field peas with snaps due to a short pack. It then advises that Kelley is in a position to give all the 2's that you will want, and will be glad to quote you in carload lots f.o.b. Midville or Milan, Georgia, stating that if interested, he would be glad to furnish you (Hoffman Grocery Company) samples, with a statement that the Kelley Cannery was the oldest packer of field peas in the United States, and that all the pack is Government graded and stating, "we will hope to hear from you." This letter is set out *in haec verba* on page 217 of the Printed Transcript of Record. In reply to this letter, the defendant wrote Kelley the letter described in Count VIII, being a request for samples as per Government's Exhibit 30 in evidence (218). Government's Exhibit 30 was read into the record and reads as follows, omitting the address:

> "Received your letter of August 20 advising me that you are in a position to supply me with number 2 peas. Would appreciate if you would furnish samples immediately, and then I will get in touch with you to see if we can work out a deal for a truckload or a carload.
>
> Thanking you in advance. Yours very truly, Ben B. Hoffman" (219).

We realize that the letter may be ever so innocent, but if it is sent in furtherance of a scheme to defraud, an offense is committed. Of course, it was not sent in furtherance of the scheme, because none of the pretenses, representations and promises were made, and further, it was in response to Kelley's letter.

On cross examination, Mr. Kelley testified that he initiated the contact with the defendant (225) and that he had made a deal for a credit transaction and after finding out Mr. Hoffman's credit rating, changed his mind (226). He further testified on cross examination:

"Q. And you testified that no reference was made over the phone with regard to his credit, I mean, Mr. Hoffman's credit? That wasn't discussed very much? There wasn't any representations to you that he had an excellent credit rating or anything of that sort was there?

A. No, there was not any mention of it" (226).

This Count is likewise not in any way supported by the evidence.

Count X charges a telephone call on August 13, 1954 to Haywards Special Products Company, Hohen Solms, Louisiana, for the purpose of placing an order for food products with the same "fraudulent representations and promises" (9). Mr. W. C. Hayward, Sr. testified on this Count as follows:

Q. Now, on the first telephone conversation, did he make any—or what was the terms that were discussed, if any?

A. Well, I asked him what business he was in in order to give him the correct price and terms.

Q. Would you explain that to the jury, where the price differential comes in?

A. Well, we generally give the wholesaler about 5% less than the retailer.

Q. I see.

A. And I gave him the wholesale price, with the understanding that he would discount his bill within ten days.

Q. Now, on that particular point, would you tell the jury the exact terms? In other words, when was the payment to be made?

A. Within ten days from the time that he received the billing.

Q. Now, if he paid within ten days, what benefit would he derive?

A. He would have derived one per cent.

Q. And if he didn't take advantage of that, the ten-day one per cent, what would have been the period he would have had to have paid the bill in any event? A. Thirty days.

Q. And was that agreed on over the telephone?

A. *I can't say it was agreed on,* but it is a known fact that—(Emphasis ours.)

Mr. Whitney: I object to that, if the Court please.

The Court: Yes, don't state that.

Q. (By Mr Eubank): Mr. Hayward, did you tell him over the telephone that those were the terms?

A. No, I did not tell him over the telephone. I told him it would be one per cent ten days.

Q. I see. Over the telephone you discussed the one per cent in ten days? A. Yes.

Q. What did Mr. Hoffman say to that?

A. He said he discounted all of his bills, and I needn't to worry about the payment of them (337, 338).

It will be noted that the telephone call charged was on August 13, 1953 and the indictment sets the date as August 13, 1954. (See discussion on this feature on pages 334 to 335 of the Printed Transcript of Record.)

Count XI charges a similar telephone call to T. L. Brice Company, Sherman, Texas, on May 29, 1953. The same charge as to representations and promises is made (10).

Q. Would you please explain first when that telephone call was had?

A. It was on or about May 25th of 1953 (122) * * *.

Q. What did Mr. Hoffman say? (123).

A. He wanted to know if he could buy some pickles, and wanted to know the price of the pickles and the delivery date of them.

Q. In regard to the pickles, what was the price that you quoted?

A. He bought several sizes which varied in price, the different sizes.

I remember one was quarts, and at that time I don't remember what the exact price was on them.

Q. What were the terms?

A. One per cent 10, net eleven.

Q. And what does that mean, for the benefit of the jury?

Mr. Whitney: I would like to have the answer to that last question.

The Witness: One per cent 10, net eleven.

That is to say, within ten days they get 1% cash discount off the invoice. If it isn't paid, the full amount of the invoice is due on the eleventh day.

Q. (By. Mr. Eubank): Was this shipment based upon the phone call gotten together by your firm? I mean, was it shipped? A. Yes, sir.

Q. Now, in the conversation with Ben, did you inquire into his business?

A. Yes, sir. Let me clarify this one moment. On the first phone call I did not. There were other phone calls which we did inquire about his credit rating, and so forth (124).

Q. Approximately, these other phone calls, when were they made?

A. The shipment of pickles was made on or about the 8th of June, and it was between approximately the 25th, and the 8th of June, 1953.

Q. The other phone calls, what statements were made at that time by Mr. Hoffman?

A. We asked him in regard to his credit rating if he was listed in Dun and Bradstreet, which he was not.

We asked him to give us some references as to the people he was purchasing from at that time, which he referred to us Eastern Packers. And then we checked at Sherman on two food concerns that distribute their products in this area, if they had heard of Mr. Hoffman, and these people said that he might be the one that purchased James A. Dick Grocery Company, and I called Mr. Hoffman and asked him if he was the one that bought out the Dick Grocery Company, and he informed me he was at that time (123, 124) * * *.

Q. This was a credit transaction, wasn't it, Mr. Brice?

A. That is right (133).

Q. And when you didn't collect it, when you couldn't collect it, you turned it over to whom?

A. To our attorney there in Sherman.

Q. And it was purely a civil matter, as far as you were concerned? A. That is right.

Q. Just a matter of another account which had gone bad, as far as you were concerned, is that right?

A. That is right.

Q. That was your only interest?

A. That is right.

Q. As a matter of fact, you made an attachment on some other merchandise, didn't you?

A. That is right.

Q. And received your payment in full?

A. We came out about even on it.

Q. After receiving the, I believe it was the $400 payment? A. That is right.

Q. Was there any other merchandise ordered?

A. No, sir.

Q. And there was not any other shipped, was there?

A. No, sir.

Q. And the $400 did not lull you into shipping any other merchandise, did it?

A. No, sir, it did not.

Q. This particular merchandise was ordered on what day, sir, do you recall?

A. On or about the 25th of May.

Q. 1953? A. That is right.

Q. And this is the shipping date on Government's Exhibit 13 in evidence?

A. It is on the right-hand side there.

Q. The shipping date would be June 4th?

A. That is right.

Q. A few days later? A. That is right.

Q. And you received payment of the $400 when, sir?

A. I would estimate about two weeks later.

Q. This is the only order you actually received?

A. That is right.

Q. And none other after you received the check, isn't that right? A. Yes, sir.

Q. With reference to Government's Exhibit 14, Mr. Brice, I will ask you if this is the sum total of all the telephone statements you received for the time in question?

A. That is right.

Q. I will ask you to examine those telephone statements, referring to the month of May of 1953, and ask you if there appears thereon that you received any phone calls from Arizona during the month of May?

A. Yes, sir, I got one here in the month of May, on the 25th day of May.

Q. That is the one you referred to on direct examination? A. That is right.

Q. And that refers to the 25th day of May of 1953?

A. That is right.

Q. And you did not receive one on the 29th day of May of 1953, did you?

A. It is not on here. No, sir, there isn't one on here for that date (133, 134, 135).

This evidence is a far cry from being sufficient to send the case to the jury on this Count.

The Verdict on the "Mail" Counts Is Unsupported by the Evidence.

III.

The lower Court erred in denying defendant's motion for judgment of acquittal at the end of the Government's case and at the end of the entire case as to Counts III, VIII and IX because (a) the evidence was insufficient to submit to the jury the question beyond a reasonable doubt as to whether said mailings were made, or if made, were in furtherance of a scheme to defraud where the evidence clearly shows that the Government failed to prove the scheme as alleged, or at all and therefore, such use of the mails could not be in furtherance of a scheme to defraud, and (b) because if there was a scheme, it was consummated prior to the time the letters were mailed, and (c) because the entire evidence shows that the transactions were credit transactions and the placing of orders for goods in and of itself does not constitute the promises and represenations charged in each Count of the indictment, and (d) because the matter mailed did not contain any representations whatsoever.

Count III is a mail fraud Count. It charges that on or about the 13th day of December, 1954, the defendant for the purpose of executing the scheme set forth in Count I, placed, or caused to be placed, a cashier's check in the amount of $500.00 payable to Long's Date Gardens enclosed in a post-paid envelope, and addressed to Long's Date Gardens, in Pasadena, California (5, 6).

If there was no scheme proven, or if the representations and promises were not made, this Count, like the "wire" Counts, was not proved. In short, what we have said con-

cerning Count I, *supra,* applies here. No scheme as alleged, or at all, was proven.

The evidence concerning Count III is that an envelope (49), Government's Exhibit 4, was identified as having been received by Long's Date Garden from Acme Distributing Company (50) and that it contained a check. The check was identified as a "cashier's check No. 27792" (51). The check is Exhibit 5 in evidence (55). It was identified as the check contained in the envelope (Exhibit 4) and was received by Mrs. Long or the Long Date Gardens (53, 54). The check was dated December 12, 1954, according to the indictment (6). The mailing is charged as being on December 13, 1954, and the envelope was dated the same day at 11:30 A.M. (71). The envelope, Exhibit 4, which contained the cashier's check, Exhibit 5, could not have possibly reached Long's Date Gardens until at least the 14th day of December, 1954. The witness admitted that much on cross examination (72). The last shipment was made on December 13 on order placed on the 11th (68, 69). Therefore, this payment on account could, under no stretch of the imagination, be termed a "lulling" payment.

This mail Count is wholly unsupported by any competent evidence.

Count VIII (8) is taken care of in our argument on Count VII, a "wire" Count relating to R. O. Kelley Cannery (see *supra,* pages 29-30 this brief). The "mail" Count is not based on any representations and promises as charged in the indictment. There is no representation in defendant's letter of August 24, 1953 (219). The defendant never heard of R. O. Kelley Cannery until he was contacted by that concern (217). There is absolutely no evidence upon which to base the offense of mailing in furtherance of a scheme to defraud as charged in this Count.

Count IX is likewise unsupported by any false and fraudulent representations and promises. There is also no competent evidence to support the mailing as charged (9). The evidence introduced by the Government as to the mailing of the letter by the defendant abstracted to the issue is that the letter, Government's Exhibit 52 for identification (339, 340) was recognized by the witness Hayward as confirming the order that Hoffman ordered over the phone; that no one opened the mail except "me or my boy" (339). "I couldn't swear that I opened this letter." Whereupon the Government offered Exhibit 52 for identification and evidence, which was received over the following objection:

"Mr. Whitney: Objected to on grounds there is no sufficient proof of mailing under the statement of the witness, and no proof at all of mailing, and no foundation laid for its introduction.

The Court: You are probably right, but I will let it be received temporarily here. I think when we used to try these cases we would have somebody. I can't remember how the mailing was proved."

The witness then read the letter to the jury (340). The following questions were asked by the United States Attorney and the following answers given:

"Q. Now, in respect to that date, you have testified that you cannot recall opening this particular letter yourself?

A. Well, it was either my boy or I. *He opens all the mail. I don't open any,* because I am across the lake. He is running the factory. (Emphasis ours.)

Q. Do you recall of your own recollection the approximate date that this got into your hand?

A. No, I could not. I couldn't remember that" (341). Irrespective of the absence of any scheme or false and fraudulent representations and promises, the evidence as

to the mailing of this letter is wholly insufficient, and the objection should have been sustained or in all events, a motion for judgment of acquittal should have been granted.

The evidence here clearly shows that each of the persons whom the defendant telephoned was an individual, and a separate conversation was had with him alone. Each of said persons, if defrauded by fraudulent representations and promises, constituted a separate scheme. *Dyhre v. Hudspeth, supra;* (distinguished in *U. S. v. Lowe,* 2 Cir., 15 F.2d 596, 599).

It is necessary in this kind of a case that the Government prove that some of the representations set forth in the indictment were made and were false. *Ballard v. U.S.,* 9 Cir. 138 F.2d 540, 545. (Reversed on other grounds, *U.S. v. Ballard, et al,* 322 U.S. 78, 64 St.Ct. 882).

The three mailings charged in the indictment, as will be noted in and of themselves contain no representations or promises whatsoever. This is not a stock selling scheme where the Government is sometimes permitted to roam at large, nor is this a charge where worthless or forged checks are placed in the mail for the purpose of defrauding. The instant case was tried upon the theory that if the defendant ordered the products set forth in the indictment, *that in itself constituted a promise and representation that the defendant intended to pay for the products ordered* (381). The lower Court instructed the jury further, that

> "* * *, but for such false representations and promises to be considered false, you must further find beyond a reasonable doubt that the defendant at the time he ordered the goods had no intention of paying for the products ordered" (381).

If this were the law, it would be dangerous for anyone to order goods for fear that if he did not pay for same, he

would be charged with a violation of the mail fraud or wire fraud statute.

The defendant, of course, took no exceptions to the Court's charge and probably waived his rights in that respect, unless this Court should deem the instruction given as plain prejudicial error.

In *Postal Decisions* 1939, with reference to the sufficiency of the evidence as to use of the mails, it is said

> "* * * In the absence of a postmarked envelope and of any testimony whatever by any person who saw the letter in or received it from the mails, a charge of mailing can not be sustained on the bare confession of accused that he mailed it." Section 144, page 151, *Postal Decisions, supra.*
>
> *U. S. v. Browne,* 7 Cir., 225 F.2d 751, 756;
>
> *Mackett v. U.S.,* 7 Cir., 90 F.2d 462, 464;
>
> *Brady v. U. S.,* 8 Cir., 24 F.2d 399, 403.

The lower Court should have entered a judgment of acquittal on all Counts in the Indictment because of failure of proof.

The Court Committed Prejudicial Error in Telling the Jury that If the Government Did Not Prove Its Case, He Would Direct a Verdict, Thereby Leaving the Impression that If He Did Not Direct a Verdict, the Defendant Was Guilty.

IV.

The lower Court committed prejudicial error in stating before the jury, after an objection had been made to evidence that if the Government didn't prove its case, he would direct a verdict, because the jury would be led to believe that if he did not direct a verdict, the defendant would be assumed guilty; the following is the objection and the Court's comments:

"Q. What did the person ask?

Mr. Whitney: If the Court please, I object to it on the grounds that no foundation has been laid for it. This is a different situation than if a man has an established phone.

The Court: If they don't prove their case I will direct a verdict.
Mr. Whitney: Thank you.
The Court: So don't interrupt just the minute a question is asked."

The above statement by the Court that if the Government failed to prove its case he would direct a verdict, certainly is prejudicial error of a substantial nature, particularly in view of the fact that he admonished counsel not to interrupt "just the minute a question is asked" (40). In a case where the evidence of the false pretenses, representations and promises are as barren, as from the record this case seems to be, we believe that these remarks made by the Court involving as it did a telephone conversation, would be highly prejudicial. The jury might very well have gone out and said, "the Judge stated that if the Government did not prove its case, he would direct a verdict, and he failed to direct one, so the defendant must be guilty." It is true that defendant did not immediately move for a mistrial, but this in no manner condones the error.

The Courts have reversed cases because the District Judge improperly reprimanded defendant's counsel, *Kraft v. U. S.*, 8 Cir., 238 F.2d 794, 800, 801.

Likewise the Courts have reversed cases for an unfair judicial interpretation of an indictment before the jury, and unfair statements while counsel for the defendant was explaining the case to the jury. *Sunderland v. U. S.*, 8 Cir., 19 F.2d 202, 208-212.

The Court Erred in Admitting Telephone Toll Bill in Evidence Showing a Call Made in 1953 Where the Indictment Charged the Call to Have Been Made in 1954.

V.

The lower Court erred in admitting Government's Exhibit 51 in evidence for the reason that said Exhibit was a telephone toll bill showing calls in August 1953 (334, 335), whereas Count X of the

indictment (9) alleges the gist of the offense to have been committed on or about August 13, 1954.

The admission of Government's Exhibit 51 in evidence unquestionably was an error. The Court realized that the objection was good, because he stated that if it was an information, the date might be changed, but not in an indictment (334, 335). The Court, notwithstanding the objection, allowed the document in evidence, because another Count in the indictment charged that there was a *mailing* on or about the 13th day of August, 1953 (335).

Count X states that the telephone call was in August, 1954; the document sought to be introduced, i.e., the telephone tolls, showed August, 1953. Count IX, which is the mailing of a letter in August, 1953, certainly cannot change the direct allegations of Count X as to date. We believe that substantial error was committed in the admission of this Exhibit.

This particular assignment is typical of other errors in the record, re: admission of evidence.

CONCLUSION

We respectfully submit first, that the indictment fails to state an offense against the United States because the alleged scheme set up is vitally defective. If, however, the scheme is properly set up, then there is absolutely no proof that the defendant made the false and fraudulent pretenses, representations and promises charged in the indictment, and therefore, the Court below should have entered a judgment of acquittal as to each and every of the ten Counts defendant was convicted on.

The Court committed prejudicial error in its remarks before the jury (40) and in admitting in evidence, Government's Exhibit 51, showing telephone call as being in Au-

gust, 1953, whereas the indictment charged (9) that said call was made in August, 1954.

The evidence was, in our judgment, insufficient to prove even that defendant made the telephone calls, to say nothing of their fraudulent content.

It is respectfully suggested that on account of the failure to prove the alleged false and fraudulent pretenses, representations and promises as laid in the indictment, that this Honorable Court should reverse the case with instructions to the Court below to enter a judgment of acquittal on each and every Count of the indictment upon which the defendant was convicted; in all events the case should be reversed.

Respectfully submitted,

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